BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.30.2003 pertaining to enforcement actions for administrative penalties	NOTICE OF AMENDMENT (WATER QUALITY)

TO: All Concerned Persons

1. On February 14, 2002, the Board of Environmental Review published a notice of public hearing on the proposed amendment of the above-stated rule at page 263, 2002 Montana Administrative Register, issue number 3. The hearing was held on April 9, 2002.

2. The Board has amended the rule as proposed, but with the following changes, stricken matter interlined, new matter underlined:

17.30.2003 ENFORCEMENT ACTIONS FOR ADMINISTRATIVE PENALTIES (1) remains the same as proposed.

(2) ~~When the department has reason to believe that a violation has occurred~~ Upon determination that a violation has occurred, the department may initiate an administrative penalty action in accordance with 75-5-611, MCA, and this rule. Except for a violation specified under (7), the department shall first issue a written notice letter to a violator by certified mail or personal delivery that:

(2)(a) through (8) remain the same as proposed.

3. The following comments were received and appear with the Board's responses:

Comment No. 1: A commentor supported the proposed amendments and appreciated being included in the process.

Response: Comment noted.

Comment No. 2: In the proposed ARM 17.30.2003(2), the phrase "When the department has reason to believe that a violation occurred" is too subjective. The department could initiate an administrative penalty action in situations where it did not have credible evidence that a violation occurred.

Response: Preliminary drafts of the proposed amendments were discussed with various interest groups to obtain support. The proposed draft of ARM 17.30.2003(2) contained the phrase: "Upon determination that a violation has occurred." When the

final proposed amendment notice was written, this phrase was changed to "When the department has reason to believe that a violation has occurred". The language was changed to conform to the language in 75-5-611(1), MCA, and the department does not believe that the change had any substantive effect. However, the department has agreed that the language can be changed to the wording that was proposed in the preliminary draft. The final adoption notice has been modified as shown above.

Comment No. 3: The proposed amendments conflict with the legislative intent of 75-5-617, MCA. The department is trying to grant itself civil penalty authority not granted or intended by the legislature. Section 75-5-617(2), MCA, prohibits the department from assessing administrative penalties for any violation, except in cases that pose an imminent threat to human health, safety or welfare, or to the environment. In accordance with 75-5-617(2), MCA, a notice letter must be sent to a violator prior to the assessment of an administrative penalty, except in cases that pose an imminent threat. If the violator corrects the violation in accordance with the notice letter, the department is not authorized to assess a penalty. The proposed rule, which creates a process to assess an administrative penalty for certain violations of 75-5-605, MCA, is contrary to the intent of the statutes as evidenced in the legislative record.

Response: The Board agrees that under 75-5-617, MCA, a notice letter must be sent prior to assessing a penalty in all cases, except those cases that pose an imminent threat. The amendments specifically implement the notice requirements of 75-5-617, MCA. The pertinent language is contained in ARM 17.30.2003(1): "Before initiating an administrative penalty action under this rule, the department shall first issue a notice letter, in accordance with 75-5-617, MCA, notifying the person of the violation and requiring compliance. The department is not required to issue a notice letter under 75-5-617, MCA, if the violation represents an imminent threat to human health, safety, welfare or to the environment."

The proposed amendments do not grant the department civil penalty authority not granted or intended by the legislature. Section 75-5-617(2), MCA, does not restrict the department from assessing a penalty in cases where the violator complies with the requirements of the notice letter sent in accordance with 75-5-617, MCA. The pertinent language in 75-5-617, MCA, states: "If the person fails to respond to the conditions in the department's letter, then the department shall take further action" (emphasis added). By its plain language, this

section is prescriptive rather than restrictive. It requires the department to take an action if the person fails to satisfy the conditions in the notice letter, but it does not restrict or even address the department's options if the person satisfies the conditions in the letter. The legislative record also does not support the proposed restrictive interpretation of the statute. Such an interpretation could lead to the incongruous result of prohibiting the department from taking enforcement action even in cases where a violation was knowing or intentional. Finally, neither 75-5-617, MCA, nor 75-5-611, MCA, limit the department's administrative penalty authority to cases involving an imminent threat.

If a person satisfies the requirements of the notice letter issued under 75-5-617, MCA, the department may in certain circumstances still take an enforcement action, including the assessment of a penalty. The circumstances in which a penalty may be assessed are set out in the new ARM 17.30.2003(7). Penalties are allowed only for violations that are Class I or are of major extent and gravity as defined in the rules.

Comment No. 4: A commentor was concerned about the overall fairness of the proposed amendments. No penalty should be imposed unless that person has received notice and has failed to correct the condition, if the condition can be remedied. Also, if a violation occurs because of natural phenomena or without knowledge or notice, there should be no penalty. No penalty should be imposed unless a person has had notice and has failed to remedy the condition.

Response: The amendments do require the department to provide informal notice and opportunity to comply as required by 75-5-617, MCA. See Response to Comment No. 3. In many cases, the correction of the condition after informal notice will result in the department closing the matter without formal enforcement action. However, the amendments give the department the ability to assess penalties for violations that have been corrected. As stated in the Response to Comment No. 3, the amendments simply implement the authority contained in 75-5-611, MCA. The amendments also limit the department's administrative penalty authority to violations that are Class I, or are of major extent and gravity as defined in the rules.

Although the water quality statutes are strict liability laws and violations can occur through no fault of the responsible party, the department considers various factors before determining that formal enforcement action is

warranted. Factors considered include the degree to which the violator was at fault, the extent of harm to health or the environment, any history of violations, and whether a penalty is needed to deter future noncompliance. These factors are also considered by the department when establishing the amount of a penalty, if one is assessed.

Comment No. 5: It is not appropriate to strike ARM 17.30.2003(6). This rule states that the department shall notify the violator, in writing, within 30 days of the resolution of an enforcement action. It is best to have a paper trail to document resolution of an enforcement action. The written response should be sent within seven days.

Response: ARM 17.30.2003(6) was deleted because it is redundant. In all administrative enforcement cases, the resolution of the enforcement action is documented with a copy of the document sent to the violator. If the parties enter into a settlement to resolve a violation, the department issues an Administrative Order on Consent that is signed by both the department and the settlor. A cover letter and a copy of the signed order are sent to the settlor. If the parties do not settle, the department issues a unilateral order that compels an action by the violator. Upon the resolution of a unilateral order, the department issues a Release. A cover letter and a copy of the Release are sent to the violator. An additional letter, as required by ARM 17.30.2003(6), is not necessary.

Comment No. 6: Under the proposed rule, the department would not be required to give advance notice of an administrative penalty proceeding for a violation of 75-5-605, MCA, where the violation was a Class I violation or of major extent and gravity. The rules also allow the department to proceed with a judicial enforcement action without advance notice and opportunity to comply.

Response: The rule, as amended, would require that a notice be issued under 75-5-617, MCA, in all administrative penalty cases except where a violation represents an imminent threat to human health, safety, welfare or to the environment. See Response to Comment No. 3. Although not addressed in the amendments, which only address administrative actions, the notice under 75-5-617, MCA, must also be issued before the department initiates a judicial action under another section of the water quality statutes.

Comment No. 7: If no administrative penalty is assessed, the rule should provide that the alleged violator should not

be identified in Department of Environmental Quality records as a violator.

Response: This issue is outside the scope of the present rulemaking. Procedures for considering past history of violations are set out in ARM 17.30.2005, which is not being amended at this time. ARM 17.30.2005(2)(c)(i) requires the department to count any violation for which the violator has received written notice within the past three years, regardless of whether a penalty was paid. The rule reflects the current water quality administrative enforcement policy that, for purposes of identifying patterns of noncompliance, all violations should be considered, not just those serious enough to warrant a penalty. The only violations not to be considered are those for which the violation notice or order was vacated or is subject to administrative or judicial appeal.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

_____ By:_____

JAMES M. MADDEN JOSEPH W. RUSSELL, M.P.H.
Rule Reviewer Chairman

Certified to the Secretary of State _____, 2002.